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ATTORNEY FOR APPELLANT:

T. ANDREW PERKINS
Peterson & Waggoner, LLP
Rochester, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FRANK FUGATE, JR.,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 25A05-0610-CR-591
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE FULTON SUPERIOR COURT
The Honorable Wayne E. Steele, Judge
Cause No. 25D01-0506-CF-133

April 9, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Frank Fugate, Jr. (Fugate), appeals the trial court's exclusion of evidence.

We affirm.

ISSUE

Fugate raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion by failing to admit portions of testimony from Fugate's sole witness into evidence.

FACTS AND PROCEDURAL HISTORY

On June 4, 2005, Fugate, his wife, Mary Ann Kline (Mary Ann), their nine-month-old daughter T.F., and Mary Ann's two daughters from previous relationships, ten-year-old K.K., and five-year-old M.S., watched a movie. After the movie, Mary Ann went to take a shower. M.S. went to play in her room with a friend and Fugate, K.K., and T.F. remained in the living room. Fugate put T.F. down at one end of the sectional sofa and laid down behind K.K. on another section of the sofa. Fugate proceeded to place K.K.'s hand on his penis inside his pants. He asked K.K. whether she wanted him to stop. K.K. said yes and jerked her hand away.

K.K. immediately went to tell her mother what happened, but Fugate joined Mary Ann in the shower before K.K. was able to speak with her mother, so K.K. told her sister instead. M.S. then told Mary Ann what happened, after which Mary Ann confronted K.K. about the incident. K.K. confirmed the account. Fugate asked what was going on and Mary Ann confronted him about what her daughters just told her. Fugate denied that

anything happened. Mary Ann instructed K.K. and M.S. to pack their bags. Mary Ann, K.K., and M.S. left, but Fugate would not allow Mary Ann to take T.F. with her.

Mary Ann initially took the girls to M.S.' father's house. Then, she and K.K. reported the incident to the Fulton County Sheriff's Department. Police officers and a child caseworker with the welfare department escorted Mary Ann back to Fugate's trailer. Mary Ann let herself and the others inside the trailer. Fugate emerged from the hallway. The police asked him to come to the living room at which point Mary Ann retrieved her daughter. Before Mary Ann left with T.F., Fugate had been placed under arrest.

The following day, Mary Ann moved her belongings out of the trailer with the help of her father, M.S.'s father, John Shepard (Shepard), and her friend, Tiffany Starling Lollar (Lollar). Mary Ann also filed for divorce from Fugate shortly thereafter. On January 3, 2006, the divorce was final.

On June 7, 2005, the State filed an Information charging Fugate with Count I, child molesting, a Class C felony, Ind. Code § 35-42-4-3(b). On June 14 and 15, 2006, a jury trial was held. On the first day of trial, Fugate's counsel presented the State with a witness list, which included Lollar. Up to this point Lollar was not listed as a defense witness. Fugate's counsel told the State that Lollar would testify to "conversations prior to June [4, 2005]." (Transcript p. 277). The State did not object to the late notice.

During Lollar's testimony Fugate's counsel asked her questions about incidents after June 4, 2005. The State objected several times. Then, outside the presence of the jury the following dialogue transpired:

[FUGATE'S COUNSEL]: Very, very briefly [Lollar] will testify [Y]our Honor, that, that she saw [Shepard] three (3) weeks after we move out in, in the apartment wearing underwear and that Mary Ann showed her a love note while at work within three (3) ...

[LOLLAR]: Three (3) days.

[FUGATE'S COUNSEL]: ... three (3) days after the moving out of the [Shepard], June the 5th wherein, in the love note, [Shepard] was professing his love of her and Mary Ann admitted sleeping with him at that time and that goes to show the bias and, and the issue of [the State's] made an issue of it, why would she have to move out. She obviously lied to us in court if you believe this witness's testimony. She said she didn't have a sexual relationship with [Shepard]. Now we have somebody that directly contradicts that. Three (3) days after the move out it tends to support the argument that the, this whole things was put up, set up in order to get a divorce and her get custody of the child.

[TRIAL COURT]: [State's counsel.]

[STATE'S COUNSEL]: Well this is the problem Judge when the defense tells you who their witnesses are on the morning of trial. So, I tried to be reasonable about that and I said, okay, what are these people going to testify to. The only thing that I was told that this person was a witness of is about conversations prior to this incident that she's testified to already about Mary Ann telling them that she had problems with the relationship or wanted out of the relationship. That's what I've been told that this witness is about. So another day goes by as we've had less than twenty four (24) hours notice that there are even witnesses and now we're into this, stuff that we've never been told. We have no idea what's coming. I would ask that the entire topic be excluded if nothing else for lack of any kind of discovery. We have no opportunity to, to interview this witness, no opportunity to refute the, these things. [Fugate's counsel] took a deposition of Mary Ann in November and asked her these questions about his, her relationship with [] Shepard and he, much like he did today and hinted around of all this stuff and so today in the defendant's case in chief is when we find out what they're really about and I, I don't think that's fair to the State and I think the whole topic, beyond what she's already talked about, should be excluded.

[FUGATE'S COUNSEL]: For the record, Judge, in the deposition, we talked about [Lollar] and [Lollar's] relationship with, with Mary Ann, and these same issues.

[STATE'S COUNSEL]: That's exactly my point. He knew months ago, it sound to me like, that, what this issue was. [Lollar], the first time we ever hear of [Lollar] was in questioning Mary Ann []. Now the defendant obviously knew who [Lollar] was and what she was gonna say. I don't think we have to find out in the middle [of] the trial or that she's even a witness in the middle of the trial.

[TRIAL COURT]: What happened on the exchange of discovery?

[STATE'S COUNSEL]: I got a witness list yesterday morning. That's the exchange of discovery other than me asking who are these witnesses.

* * *

[TRIAL COURT]: There was a scheduled final pretrial conference for June 6th of 2006. Did the parties submit the pretrial, final pretrial memorandum to the [c]ourt?

[FUGATE'S COUNSEL]: No.

[STATE'S COUNSEL]: No we did not. I have a, a pretrial memorandum from a prior and I realized that Monday when I was getting ready for this thing or Tue ... whenever this trial started. The day before. I have a pretrial conference memorandum, I don't believe it, it's not from the 6th, but from a prior final pretrial that the State had filled out but the other half had never been filled out and so you're never had one (1) submitted to you.

[TRIAL COURT]: Well, the [c]ourt's gonna sustain the objection. I'm not gonna, we're not gonna try this thing by trial by amb ... ambush on both sides. If there was a witness and information that should've been exchanged in discovery months ago, which it sounds like to me like it should've been, we're not gonna play that game. So I will sustain the objection and exclude testimony and if you got other things to talk to her about, that's fine, but we're not gonna go down the throat.

(Tr. pp. 276-78). After all the evidence was submitted, the jury found Fugate guilty as charged of Count I, child molesting, a Class C felony.

Fugate now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Fugate contends the trial court abused its discretion and violated his Sixth Amendment rights under the United States Constitution when it excluded evidence from his sole witness, after the trial court concluded Fugate failed to comply with discovery requirements. Specifically, Fugate argues the trial court failed to create an adequate record concerning its decision to preclude the evidence, abused its discretion by disallowing the evidence rather than granting a continuance, and violated his Sixth Amendment rights by excluding evidence based upon noncompliance with discovery rules.

Trial court has the discretion to exclude belatedly disclosed witnesses. *S.T. v. State*, 764 N.E.2d 632, 635 (Ind. 2002). However, that discretion is limited to instances where there is evidence of bad faith on the part of counsel *or* a showing of substantial prejudice to the State.¹ *Id.* (emphasis added); *see also Williams v. State*, 714 N.E.2d 644, 651 (Ind. 1999), *cert. denied*; *Cook v. State*, 675 N.E.2d 687, 691 (Ind. 1996); *Wiseheart v. State*, 491 N.E.2d 985, 988 (Ind. 1986). In light of a defendant's right to compulsory process under the federal and state constitutions, there is a strong presumption in favor of allowing the testimony of even late-disclosed witnesses. *S.T.*, 764 N.E.2d at 636; *see also* U.S. Const. Amend VI; Ind. Const. Art. I § 13. Additionally, where a party fails to

¹ We note that in *Wiseheart v. State*, 491 N.E.2d 985, 988 (Ind. 1986), the premier case addressing the issue of defense counsel's failure to comply with discovery requirements, the standard of review reads as follows, "the primary factors which a trial court should examine are whether the breach was intentional or in bad faith *and* whether substantial prejudice has resulted." (Emphasis added). In more recent decisions, however, the supreme court has changed its language to 'or' as evidenced in *S.T. v. State*, 764 N.E.2d 632, 365 (Ind. 2002), which cites a string of cases including *Williams v. State*, 714 N.E.2d 644, 651 (Ind. 1999), *Cook v. State*, 675 N.E.2d 687, 691 (Ind. 1996), and, incidentally, *Wiseheart*. While we thought the change noteworthy, we will follow the most recent language of the supreme court as declared in *S.T.*

disclose a witness timely, trial courts generally remedy the situation by providing a continuance rather than disallowing the testimony. *Id.*

The supreme court also prescribed considerations for trial courts in order to fully assess the rights of both parties to a fair trial and the criminal defendant's Sixth Amendment right to present witnesses on his or her behalf. The considerations include:

- (1) Whether the nature of defendant's violation was trivial or substantial. The trial court should consider when the witness first became known to defense counsel.
- (2) How vital the potential witness' testimony is to the defendant's case. The trial court should determine the significance of the proffered testimony to the defense. Is the testimony relevant and material to the defense or merely cumulative?
- (3) The nature of the prejudice to the State. Does the violation have a deleterious impact on the case prepared by the State?
- (4) Whether less stringent sanctions are appropriate and effective to protect the interest of both the defendant and the State.
- (5) Whether the State will be unduly surprised and prejudiced by the inclusion of the witness' testimony despite the available and reasonable alternative sanctions (e.g., a recess or a continuance) which can mitigate prejudice to the State by permitting the State to interview the witnesses and conduct further investigation, if necessary.

Wiseheart, 491 N.E.2d at 991. Of course, the supreme court recognized that other factors may be relevant, or that some of their suggested considerations may not be applicable in certain situations. *Id.*

In this case, defense counsel took Lollar's deposition eight months before trial. She was being called to provide motive on the part of Mary Ann to fabricate charges against Fugate in order obtain a divorce from Fugate and be granted custody of their daughter. The State faced a substantial prejudice by not having notice of this witness and the basis of her testimony. Whether or not a

continuance would have been proper in this case and prevented prejudice to the State is outweighed by the bad faith shown by Fugate's counsel concealing Lollar as a potential witness.

Lollar was not listed as a potential witness on any witness list during pretrial discovery. And, when she was identified as a witness the morning of trial, the exact nature of her testimony was concealed. The supreme court has provided numerous safeguards to ensure parties receive fair trials and protect a criminal defendant's Sixth Amendment right to present witnesses on his or her behalf. *See Wiseheart*, 491 N.E.2d at 991. Except, purposeful or intentional breaches by the defendant, or substantial and irreparable prejudices are a deal breakers. *See id.* This may not be the most egregious instance of a resulting breach or resulting prejudice, but Fugate's counsel had multiple opportunities to disclose the scope of Lollar's testimony, and did not. Thus, while a recess or a continuance were certainly options available to the trial court, we do not find, based on the facts of this case, that the trial court abused its discretion by not allowing Lollar's testimony of events occurring after June 4, 2005.

CONCLUSION

Based on the foregoing, we find the trial court did not abuse its discretion by disallowing portions of testimony from Fugate's sole witness.

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.